Supreme Court, U.S.
FILED
APR 28 1994
OFFICE OF THE CLERK

No. 93-1341

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF IN OPPOSITION FOR RESPONDENT MON VALLEY ENERGY CORPORATION

CLIFFORD B. LEVINE
(Counsel of Record)
ALICE B. MITINGER
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-2396
Counsel for
Mon Valley Energy Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

RULE 29.1 STATEMENT

The parent company of Mon Valley Energy Corporation is Sagamore Corporation, a Connecticut corporation. Mon Valley Energy Corporation is a general partner in a limited partnership known as Mon Valley Energy Limited Partnership, which has, as its other general partner, CMS Generation Mon Valley Company, a Michigan corporation.

TABLE OF CONTENTS

	Page
RULE 29.1 STATEMENT	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	4
A. Mon Valley adopts the Statements of the Case presented by Respondents Milesburg Energy, Inc. and the Pennsylvania PUC	4
B. Procedural History	5
1. Regulatory Review Requirement	5
2. Regulatory Review Proceeding	5
3. Decision at Issue	6
REASONS FOR DENYING THE WRIT	9
I. INTRODUCTION	9
II. THE REGULATORY SCHEME FOR IMPLEMENTATION OF PURPA IN PENNSYLVANIA ALLOWING THE PUC TO REVIEW AND ALTER PURPA CONTRACTS AND UTILITY CUSTOMERS TO PARTICIPATE IN THE REVIEW OF THOSE CONTRACTS IS CONSISTENT WITH THE FEDERAL POLICY UNDERLYING PURPA	10
A. Regulatory Framework of PURPA	10
B. Pennsylvania requirement of due process hearing to review PURPA contracts established in *Milesburg I*	12
C. In *Milesburg II*, the Commonwealth Court recognized the authority of the PUC to modify contracts that do not conform to PURPA..	13

TABLE OF CONTENTS—Continued

Page

III. PETITIONERS' OBJECTIONS TO THE RAMIFICATIONS OF THE REGULATORY REVIEW PROCESS IN PENNSYLVANIA DO NOT CONSTITUTE A LEGITIMATE BASIS FOR THIS COURT'S REVIEW 14

A. In Pennsylyvania, a PURPA contract submitted to the PUC for approval is not a "freely negotiated agreement" 14

B. Because the PUC has not determined the rate for the project, Petitioners' argument relating to "excessive costs" of the project is unsupported 18

C. The PUC's authority to modify an agreement submitted to it for approval is a reasonable mechanism for enforcing the provisions of PURPA 18

IV. ALTHOUGH THE PUC AND THE PENNSYLVANIA COURTS REASONABLY FOUND THAT THE QF INCURRED A "LEGALLY ENFORCEABLE OBLIGATION" AS OF THE TIME IT ENTERED A CONTRACT WITH THE UTILITY, THE PUC HAS NOT YET MADE A FINAL CALCULATION OF THE RATE UNDER THAT STANDARD AND THUS, THE QUESTION OF WHETHER THE RATE WILL RESULT IN EXCESSIVE COSTS IS NOT BEFORE THIS COURT 19

A. Petitioners' argument as to the appropriate date for calculation of "avoided costs" leads to an absurd conclusion 19

B. Cases from other states cited by the Petitioners do not support their contention that the Pennsylvania decisions are contrary to PURPA 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: Page

American Paper Institute, Inc. v. American Electric Power Service Corporation, 461 U.S. 402 (1983) 12

A.W. Brown v. Idaho Power Company, 121 Idaho 812, 828 P.2d 841 (1992) 22

Barasch v. Pennsylvania Public Utility Commission, 119 Pa.Commw.Ct. 81, 546 A.2d 1296 (1988), *appeal denied*, 523 Pa. 652, 567 A.2d 655 (1989) ..... *passim*

Bates Fabrics Inc. v. Public Utilities Commission, 447 A.2d 1211 (Me. 1982) 17

FERC v. Mississippi, 456 U.S. 742 (1982) 10, 11, 14, 19

In re Vicon Recovery Systems, 153 Vt. 539, 572 A.2d 1355 (Vt. 1990) 15, 16

Petition of East Georgia Cogeneration, 158 Vt. 525, 614 A.2d 799 (1992) 21

Public Utility Commission of Texas v. Gulf States Utilities Company, 809 S.W. 2d 201 (Tex. 1991) 15, 16

Water Power Co., Inc. v. PacifiCorp, 99 Or. App. 125, 781 P.2d 860 (1989), *review denied*, 309 Or. 291, 787 P.2d 997, *cert. denied*, 498 U.S. 811 (1990) 17

West Penn Power Company v. Pennsylvania Public Utility Comm'n, 150 Pa.Commw.Ct. 349, 615 A.2d 951 (1992), *appeal denied*, —— Pa. ——, —— A.2d —— (1993), petition filed at No. 93-1535 4

Federal Statutes, Regulations, and Rules:

16 U.S.C. § 796(17)(A) 2

16 U.S.C. § 796(18)(A) 2

16 U.S.C. § 824a-3 ..... 2, 4

16 U.S.C. § 824a-3(a) 10-11

16 U.S.C. § 824a-3(f) 11

18 C.F.R. § 292.101(a) 2

18 C.F.R. § 292.101(a)(6) 3

18 C.F.R. § 292.205 4

18 C.F.R. § 292.206 4

18 C.F.R. § 292.304 3

TABLE OF AUTHORITIES—Continued

	Page
18 C.F.R. § 292.304 (b) (5)	20
18 C.F.R. § 292.304 (d)	7
18 C.F.R. § 292.401 (a)	11
Pennsylvania Regulations:	
52 Pa. Code § 57.31, *et seq.*	12
Other Authorities:	
H.R. Conf. Rep. No. 95-543, 95th Cong. 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 7675	10
45 Fed. Reg. 12,214 (1980)	11, 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1341

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF IN OPPOSITION FOR RESPONDENT MON VALLEY ENERGY CORPORATION

INTRODUCTION

The Petition for Writ of Certiorari does not present any issue warranting this Court's review. Instead, Petitioners West Penn Power Company ("West Penn"), Armco Advanced Materials Company ("Armco") and Allegheny Ludlum Corporation ("Allegheny") take extraordinary liberties with the facts and record in this case in seeking review of a decision of the Pennsylvania Commonwealth Court that the Pennsylvania Supreme Court properly affirmed, *per curiam*.[1] In arguing that the

---

[1] Although the Petitioners refer to the court as being "equally divided," in fact, with respect to the salient issue here, the court was unanimous.

Pennsylvania decisions are not in accord with the federal policy underlying the Public Utility Regulatory Policies Act of 1978 ("PURPA")[2] or with the decisions of other states, the Petitioners ignore not only the clear factual distinctions between the Pennsylvania cases and those of other states but also ignore the clear legislative mandate that allowed the individual states to develop their own regulatory schemes to implement the provisions of PURPA.

The Petitioners premise their arguments on the unsupported and fallacious assertion that the action of the Pennsylvania Public Utility Commission ("PUC") in ordering the modification of the Electric Energy Purchase Agreement ("EEPA") between Milesburg Energy Inc. ("Milesburg") and West Penn will result in costs that are not "just and reasonable" to West Penn's customers. However, a review of the history of this proceeding reveals that calculation of the "avoided cost" rate contained in the EEPA is the subject of the Commonwealth Court's direction on remand to the PUC and has yet to be performed.

The Petitioners also argue that the PUC exceeded its authority by modifying what they characterize as a "private contract." Yet, it was Armco and Allegheny's insistence on participation in the PUC's process for reviewing certain agreements between several "qualifying facilities"[3] and West Penn that highlighted the fact that a

---

[2] 16 U.S.C. 824a-3.

[3] The regulations define a "qualifying facility" as a cogeneration or a small power production facility which meets the size, ownership, operating, efficiency and fuel use criteria contained in the regulations. 18 C.F.R. § 292.101(a). The statute defines a "cogeneration facility" as a facility which produces electric energy and steam or other forms of useful energy which are used for industrial, commercial, heating or cooling purposes. 16 U.S.C. § 796(18)(A). A "small power production" facility produces electric power from biomass, waste, or renewable resources such as wind, water, or solar energy. 16 U.S.C. § 796(17)(A). Under the Act, qualifying facilities are entitled to a rate based on the incremental cost to the

PURPA agreement that is subject to public review is not a purely private contract. Incredibly, as joint petitioners to this Court with West Penn, Armco and Allegheny now insist that the Milesburg EEPA was purely private and somehow expired while Armco and Allegheny sought judicial leave to participate in the PUC's review of terms of the EEPA. As the Pennsylvania Commonwealth and Supreme Courts recognized, the PUC's authority to modify the agreement was inherent in the PUC's review process. The PUC found that the extension of certain milestone dates was required to preserve the contract during the extensive review process which Armco and Allegheny sought and obtained.

The decision of the Pennsylvania Commonwealth Court implements the policy goals that led to the enactment of PURPA. The Pennsylvania Supreme Court properly affirmed the Commonwealth Court's decision. By taking disparate positions and misrepresenting the record, as well as the reasoning and holdings of the Pennsylvania Commonwealth and Supreme Courts, Petitioners essentially ask this Court to substitute the reasonable determination of the Pennsylvania PUC, as affirmed by the Pennsylvania courts, with the unsupported representations of the utility and two of its industrial customers.

Certiorari would not be warranted even if the issues stated in the Petition were supported by the record. This Court has upheld the flexibility afforded to the states in implementing the provisions of PURPA. The regulations and case law developed in Pennsylvania reflect the flexibility in implementation among the states and not a

---

utility of building new generating capacity of its own or purchasing energy from another source, i.e., the utility's "avoided costs." 18 C.F.R. § 292.304. "Avoided costs" are defined as the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(a)(6).

divergence from the underlying philosophy of PURPA. Because the courts of Pennsylvania correctly applied PURPA and because their decisions do not represent a conflict with the highest court of any other state, certiorari is not warranted.

STATEMENT OF THE CASE

A. Mon Valley adopts the Statements of the Case presented by Respondents Milesburg Energy, Inc. and the Pennsylvania PUC

Respondent Mon Valley Energy Corporation ("Mon Valley") is the developer of the Shannopin Project, an 80 megawatt qualifying cogeneration facility or "QF" within the meaning of Section 210 of PURPA and the regulations of the Federal Energy Regulatory Commission ("FERC") implementing the Act. 16 U.S.C. § 824a-3,18 C.F.R. §§ 292.205 and 206. Like Milesburg, Mon Valley entered an EEPA with West Penn under which Mon Valley was to sell the electric energy from the Shannopin Project to West Penn. The "avoided cost" rates contained in both the Milesburg and Mon Valley EEPAs were based on West Penn's need for three 300 megawatt coal-fired units as presented in its public filings with the PUC, and represented a discount from West Penn's "full avoided costs."

The Pennsylvania Supreme Court declined to review the decision of the Pennsylvania Commonwealth Court relating to the Shannopin Project.[4] The same Petitioners here have filed a Petition for Writ of Certiorari with respect to the Shannopin proceeding. Here, Mon Valley adopts the Statements of the Case presented by Respondents Milesburg and the Pennsylvania PUC.

---

[4] *West Penn Power Company v. Pennsylvania Public Utility Comm'n*, 150 Pa.Commw. Ct. 349, 615 A.2d 951 (1992), *appeal denied*, —— Pa. ——, —— A.2d —— (1993), petition filed at No. 93-1535. (*"Shannopin II"*).

B. Procedural History

1. Regulatory Review Requirement

The procedural history of the case at issue is inextricably intertwined with the decisions of the Pennsylvania courts in the other cases involving QF projects that entered EEPAs with West Penn. In the Milesburg proceeding, following the PUC's tentative approval of the Milesburg EEPA, Armco and Allegheny filed an appeal to the Pennsylvania Commonwealth Court, arguing that they, as ratepayers, should have the right to participate in an evidentiary hearing to aid the PUC in the evaluation of the EEPA between Milesburg and West Penn. In effect, the industrial customers argued that the PUC should be required to modify the rate contained in the agreements if it found that those rates exceeded the utility's avoided costs.

In *Barasch v. Pennsylvania Public Utility Commission*, 119 Pa.Commw.Ct. 81, 546 A.2d 1296 (1988), *appeal denied*, 523 Pa. 652, 567 A.2d 655 (1989) ("*Milesburg I*")[5], the Pennsylvania Commonwealth Court agreed with Armco and Allegheny and held that West Penn was required to notify its customers of proposed EEPAs and that the PUC was required to conduct an evidentiary hearing with respect to the EEPAs in which the customers were entitled to participate.

2. Regulatory Review Proceeding

Following *Milesburg I*, the PUC consolidated for review the proceedings involving four projects that had entered EEPAs with West Penn including the Milesburg, Shannopin and Burgettstown Projects. An Administrative Law Judge ("ALJ") of the PUC conducted a two-week hearing in April, 1989 during which he examined the EEPAs for the projects. The ALJ addressed the two primary issues raised in the hearing in separate phases.

---

[5] Appendix E.

Phase I addressed the calculations of the avoided cost rates in the agreements. Phase II addressed the extension of milestone dates in the Milesburg and Burgettstown EEPAs.[6]

3. *Decision at Issue*

The primary issue raised by the industrial customers with respect to Phase I of the hearing was the appropriate time to establish the rates contained in the EEPAs. The rates had been calculated using West Penn's methodology and were based on the cost of avoiding portions of three 300 MW coal-fired units for which West Penn asserted a need. The calculations of the rates were made as of 1986, the time the parties reached agreement in principle on the rate, i.e., the time of "serious negotiations." The in-industrial customers argued that the rate should be calculated as of the date of contract execution.

With its September, 1989 Order, with respect to Phase I, the PUC approved the rates contained in the EEPAs as based on the coal units. It held that the capacity rates had been properly calculated as of the time of "serious negotiations." With respect to Phase II, the PUC granted the requested modifications to the Milesburg and Burgettstown EEPAs. The PUC acknowledged the impact of requiring administrative review of the EEPAs as a result of *Milesburg I* and noted:

> In our view it is essential that regulatory delay in the proceeding be recognized and reflected in our Order. To do otherwise would merely extend an open invitation to interventions in opposition to future QF proceedings since intervenors would realize that they could win by default, through the passage of time alone, results that could not be won on the merits.

(280a).

---

[6] The "milestone dates" in the EEPAs include the dates of several good faith deposits, the date of financing closing and the in-service date for the facility. Under the terms of the EEPAs, if any of these milestone dates were not met, the EEPAs would expire.

West Penn, Armco and Allegheny appealed the PUC's modification of the Milesburg and Burgettstown EEPAs to the Pennsylvania Commonwealth Court, maintaining that the PUC lacked the authority to modify the EEPAs.

On July 17, 1990, the Commonwealth Court issued its decision in *Milesburg II*.[7] The court accepted Armco and Allegheny's argument with respect to Phase I and found that, under the federal PURPA regulations at 18 C.F.R. § 292.304(d), the rate must be calculated as of the time the QF had "legally obligated" itself to deliver capacity to the utility. The court recognized that the "legally enforceable obligation" involved is that of the QF to the utility and that obligation was incurred at the time the QF entered a contract with the utility. (41a).

In addressing the facts in *Milesburg II*, the court found that the QF had not incured a "legally enforceable obligation" to the utility as of the time of "serious negotiations." (34a). It determined, however, that the QF had incurred such an obligation when it entered the EEPA with the utility. The court thus held that the avoided cost rate must be calculated as of the date of contract and remanded the proceeding to the PUC for recalculation of the rate using input appropriate as of that date. (41a). The PUC has not yet performed a calculation as of the date of contract for the Milesburg Project.

With respect to Phase II, the Commonwealth Court confirmed the PUC's exercise of its authority to modify the EEPA to ensure that it complied with the FERC regulations and the goals of PURPA and to ensure that the regulatory review did not result in the termination of the projects. The court recognized that because West Penn submitted the EEPA to the PUC for approval and because customers were entitled, under *Milesburg I*, to participate in the PUC's review process, the EEPA was not a purely private instrument.

---

[7] Appendix B.

The court found that, unlike a private contract, an agreement submitted to the PUC for approval was the functional equivalent of a petition by the QF asking the PUC to compel the utility to enter into a contract. It thus concluded:

> In our view, the PUC has full discretion in its exercise of its powers under PURPA and the FERC regulations to encourage the development of cogeneration and small power production to ensure that litigation delays do not become the factor that determines whether a project succeeds or fails.

(39-40a).

The Commonwealth Court reiterated that the QF had incurred a "legally enforceable obligation" to the utility as of the time it entered a contract with the utility. The court held, however, that the permited milestone-related modifications did not result in a new "legally enforceable obligation."

The Pennsylvania Supreme Court accepted *Milesburg II* for review and affirmed the Commonwealth Court's decision *per curiam* with respect to both Phase I and Phase II.[8] Although equally divided with respect to the Phase I decision as to whether a "legally enforceable obligation" had been established at the time of "serious negotiations" or contract signing, the court unanimously agreed that the PUC had the authority to preserve the contract by modifying it.[9]

---

[8] Appendix A.

[9] Mr. Justice Papadakos, joined by two other justices, authored a brief opinion in which he questioned the court's decision with respect to Phase I. With respect to the Phase II modification issue, however, Mr. Justice Papadakos and the justices who joined his opinion, agreed that the Commission properly exercised its authority in modifying the agreement.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

The Pennsylvania Commonwealth Court fully considered and correctly applied the law to the record in this case. The Pennsylvania Supreme Court properly affirmed the Commonwealth Court's decision.

The decision at issue here involves a dispute as to the proper implementation of PURPA in Pennsylvania. When Congress enacted PURPA, it recognized that the regulatory agencies of the individual states were uniquely situated to address questions of implementation of the Act. Congress thus directed the states to develop their own regulations implementing the Act. The cases from other states cited by the Petitioners reflect no conflict among the states as to the policy underlying the Act but a variety in methods of implementation of the Act. Pennsylvania's strong preference for evidentiary hearings as a means to protect the due process rights of third parties in the review of PURPA contracts, as reflected in the case at issue here, clearly distinguishes the Pennsylvania regulatory scheme from those developed in other jurisdictions.

In addition, the whole of Petitioners' argument is premised on the assertion that the contract will result in rates that are not "just and reasonable" to the utility's customers. Although Petitioners present this assertion as a uncontroverted fact, the record reveals that the determination of the rate for the project and thus, of the cost of the project to the utility's customers, is the subject of the Commonwealth Court's direction on remand and has yet to be performed by the PUC.

The decisions below present no conflict with decisions of this Court or of the highest court of any other state. This Court should thus decline Petitioners' invitation to prolong the gyre of litigation that has engulfed this project.

II. THE REGULATORY SCHEME FOR IMPLEMENTATION OF PURPA IN PENNSYLVANIA ALLOWING THE PUC TO REVIEW AND ALTER PURPA CONTRACTS AND UTILITY CUSTOMERS TO PARTICIPATE IN THE REVIEW OF THOSE CONTRACTS IS CONSISTENT WITH THE FEDERAL POLICY UNDERLYING PURPA

A. Regulatory Framework of PURPA

Congress enacted PURPA as part of the National Energy Act of 1978. The Act was designed to alleviate the dependence of the nation's electric utilities on foreign oil and natural gas by encouraging the development of cogeneration and small power production facilities. Congress specifically noted that the increased reliance on oil imports had serious implications for both international security and the world economy. It cautioned:

> We must begin now, while there is still time to make adjustments, to change the way Americans use energy and avoid the destruction that could be suddenly thrust upon us from external sources.

H.R. Conf. Rep. No. 95-543, 95th Cong., 2d Sess. (1978), *reprinted at* 1978 U.S. Code & Ad. News 7675.

As this Court noted in *FERC v. Mississippi*, 456 U.S. 742 (1982):

> Congress believed that increased use of these sources of energy [cogeneration and small power production facilities] would reduce the demand for traditional fossil fuels.

Id. at 750.

Congress recognized that one of the primary deterrents in the development of these alternate capacity resources was the reluctance of utilities to purchase from these facilities. *Id.* at 750-1 and n.12. With PURPA, it created a federal statutory duty requiring electric utilities to purchase from qualifying facilities or "QFs." 16 U.S.C.

§ 824a-3(a). This case highlights the resistance of one utility to complying with that duty.

PURPA dictates that state regulatory authorities, with their expertise and knowledge of local conditions, be the primary enforcers of the Act. The Act requires the FERC and state regulatory authorities to adopt rules implementing the Act. 16 U.S.C. § 824a-3(f). It further affords great latitude to the state agencies in effectuating the purposes of the Act. 16 U.S.C. § 824a-3(f); 45 Fed. Reg. 12,214 at 12,230-31 (1980). The PURPA regulations promulgated by FERC specifically provide that states may take "any action reasonably designed to implement" the provisions of PURPA. 18 C.F.R. § 292.401(a). In effect, therefore, Congress charged state regulatory agencies with developing a procedure, either by regulations or adjudications, under which utilities could be compelled to purchase energy from QFs.

This Court approved the flexibility afforded to the states in *FERC v. Mississippi*. This Court observed:

> a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.

Id. at 751.

There, this Court found that the regulatory scheme in PURPA, in which the federal government sought to use state regulatory machinery to advance federal goals, was constitutional. *Id.* at 758. The Court held that Section 210 of PURPA "does nothing more than pre-empt conflicting state enactments in the traditional way." *Id.* It further reasoned that the statute and the implementing regulations simply require the state regulatory agencies to adjudicate disputes arising between QFs and utilities.

PURPA requires utilities to purchase capacity from QFs at rates which must be "just and reasonable" to the

consumer and "in the public interest." The Act also requires that the rate paid to a QF should not exceed the utility's avoided cost of alternate energy. As this Court recognized in *American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402 (1983), a rate that does not exceed the utility's "full avoided costs" is *per se* "just and reasonable." *Id.* at 417.

B. Pennsylvania requirement of due process hearing to review PURPA contracts established in *Milesburg I*

In Pennsylvania, the regulations promulgated by the PUC essentially follow the federal regulations. 52 Pa. Code §§ 57.31 *et seq.* The additional requirement of an extensive evidentiary review of PURPA contracts submitted to the Pennsylvania PUC for approval developed as the result of the Commonwealth Court's decision in *Milesburg I*. Although the Petitioners here relegate discussion of *Milesburg I* to a footnote, the impact of that decision on the regulatory review process for PURPA contracts in Pennsylvania is significant.

In that case, the same industrial customers that petition this Court appealed to the Pennsylvania Commonwealth Court the PUC's approval, without hearing, of the EEPA between West Penn and Milesburg. Armco and Allegheny argued that they were entitled to a hearing to address the rate contained in the EEPA. The underlying premise of Armco and Allegheny's argument was that because an EEPA could affect ratepayers, it was not purely private. The court agreed with the utility customers and held that the ratepayers were entitled to some form of due process protection. It thus directed the PUC to provide a forum in which the ratepayers could participate and directed the utility to provide notice of the PUC's hearing to each of its thousands of customers.

Milesburg I thus expanded the regulatory requirements of PURPA in Pennsylvania. In addition to the PUC's inherent obligation to review PURPA arrangements be-

tween utilities and QFs, third parties were suddenly allowed to contest provisions of an agreement between the QF and the utility. Thus, the particular terms of the instrument could no longer be considered those of a purely private agreement. As a result of the Commonwealth Court's determination in *Milesburg I*, the PUC is required to conduct a full evidentiary review of PURPA contracts submitted to it for approval.

C. In *Milesburg II*, the Commonwealth Court recognized the authority of the PUC to modify contracts that do not conform to PURPA

After reviewing the provisions of the Milesburg EEPA pursuant to *Milesburg I*, the PUC correctly recognized that allowing the milestone dates of an EEPA to pass, pending a protracted administrative hearing, contradicted its directive under PURPA to encourage the development of QFs. In modifying the Milesburg EEPA, the PUC properly exercised its authority under PURPA by preserving the agreement so that it was not destroyed by the delay of the administrative hearing.

In *Milesburg II*, the Commonwealth Court similarly recognized that, as a resutl of the regulatory review requirement established in *Milesburg I*, an EEPA submitted to the PUC for approval was not a purely private agreement between two parties. President Judge David W. Craig of the Commonwealth Court, the author of both the *Milesburg I* and *Milesburg II* opinions, understood that the PUC has substantial responsibility under PURPA to review all aspects of the EEPA and necessarily has the power to preserve the substance of the agreement, pending an extensive administrative review process.

As the court recognized, under the extensive administrative review process demanded by the ratepayers, the contract was not a private agreement that could be analyzed independent of the obligations mandated under PURPA. To allow an agreement to expire during the

course of an administrative review was to obviate PURPA's intended encouragement of QF development. Further, to deprive the PUC of any ability to adjust the contract to preserve the status quo encourages parties opposed to the project, for whatever reason, to prolong litigation in an effort to kill the project.

The regulatory scheme for implementation of PURPA as developed in Pennsylvania represents a reasonable implementation of the Act. This Court recognized in *FERC v. Mississippi* that directing the individual states to implement the Act would allow great flexibility to the states and would allow the state regulatory agencies to take any action reasonably designed to give effect to the Act. In this case, the Pennsylvania PUC took action to preserve a PURPA contract so that its opponents could not use the regulatory process to achieve the project's failure.

III. PETITIONERS' OBJECTIONS TO THE RAMIFICATIONS OF THE REGULATORY REVIEW PROCESS IN PENNSYLVANIA DO NOT CONSTITUTE A LEGITIMATE BASIS FOR THIS COURT'S REVIEW

The Petitioners complain that the implementation of PURPA in Pennsylvania represents an unacceptable deviation from the federal law in three ways. None of their objections constitute a legitimate basis for this Court's review.

A. In Pennsylvania, a PURPA contract submitted to the PUC for approval is not a "freely negotiated agreement"

The Petitioners first contend that the PUC and the reviewing courts have "dissolved" the distinction between a "freely-negotiated agreement" and "federally-mandated orders to purchase." (Pet. at 23). Because Armco and Allegheny initially sought to alter the rates contained in the agreement and were provided the opportunity to contest all of the provisions of the agreement, this is a particularly curious argument. Further, as the Pennsylvania

Commonwealth Court recognized, the utility was not required to submit the contract to the PUC for approval. Because it chose to do so, it subjected itself to the possibility that the PUC would not automatically approve of all the contract provisions that the utility had negotiated.

The cases from other states that Petitioners cite provide no support for their argument that the decision at issue served to blur the distinction between privately negotiated PURPA contracts and mandated purchases. Although the courts in both *In Re Vicon Recovery Systems*, 153 Vt. 539, 572 A.2d 1355 (1990) and *Public Utility Commission of Texas v. Gulf States Utilities Company*, 809 S.W. 2d 201 (Tex. 1991) discuss that distinction, neither state had established a regulatory review process like that in Pennsylvania. Thus, simply on the basis of PURPA's requirement that the individual states develop their own rules to implement the Act, those cases are distinguishable from this Pennsylvania case.

In *Gulf States*, the utility sought a determination that its contract with a QF, which contained rates in excess of avoided costs, was valid. The Texas court held that, as a voluntary arrangement, the state and federal regulations did not apply to the contract. The court recognized, however, that although the utility could contract for any purchase price it chose, it risked the possibility that the PUC would refuse to allow it to recover the costs under its ordinary ratemaking powers. 809 S.W.2d at 209.

Unlike the agreement here, the contract at issue in *Gulf States* was not subject to an administrative hearing with the participation of ratepayers to ensure that the rates in the agreement did not exceed the utility's avoided costs. West Penn could have chosen not to submit the agreement to the PUC for approval. Because it did seek the PUC's approval, the PUC was required to review the relationship between West Penn and Milesburg under PURPA.

In accordance with *Milesburg I*, the Pennsylvania PUC was required to conduct a hearing to ensure that the rate contained in the EEPA was below the utility's avoided costs. This fundamental distinction is critical in evaluating the significance of the *Gulf Utilities* case here. The Texas Commission is not required to conduct a similar review. If the Pennsylvania Commission were to permit a utility to pass through any rate contained in a PURPA contract, even if those rates were in excess of avoided costs, then the exercise of having industrial ratepayers participate in a hearing and challenge those rates would be totally without purpose.

The Petitioners also cite *Vicon* to support its position that a "voluntary" contract submited to the PUC for rate approval remains outside of PURPA regulation. The difference in regulatory schemes in Pennsylvania and Vermont distinguish *Vicon* from this case. Vermont, unlike Pennsylvania, does not require an evidentiary hearing to address whether the rate contained in the power purchase agreement exceeds the utility's avoided costs. Vermont does require that power purchase agreements be submitted to the Public Service Board 45 days before execution. In *Vicon*, the court held that the Public Service Board had properly denied the motion seeking approval of a negotiated agreement that had been submitted to it three years after execution. Upon review of the parties' conduct, the Board found that there was "no necessity whatever" for the delay. The court held that this was a sufficient basis for upholding the Board's action. In contrast, in the case at issue here, the judicially-mandated regulatory review process precipitated the delay. Thus, the Vermont case does not apply.

Obviously, to the extent that ratepayers have due process input under *Milesburg I*, the Milesburg EEPA is not a purely "voluntary" agreement between the parties. The PUC's review requires an analysis of capacity need, avoided costs and other issues critical in a determination under PURPA. President Judge Craig of the Common-

wealth Court, following the decision he authored in *Milesburg I*, correctly recognized in *Milesburg II* that the review process before the PUC necessarily bestowed upon the PUC the authority to preserve the EEPA long enough to permit the evidentiary hearing and related appeals. The due process procedures and related evidentiary hearing involving ratepayers, as sought by Armco and Allegheny and required by *Milesburg I*, vary considerably from the review processes in the Texas and Vermont cases.[10]

Just as the Petitioners attempt to ignore the significance of *Milesburg I* on the regulatory review process in Pennsylvania, they attempt to dismiss the distinctions that the Commonwealth Court recognized. In Pennsylvania, a PURPA contract submitted to the PUC for approval is not a purely private contract. Because the decisions from other states merely reflect the different methods of implementation envisioned by PURPA, no conflict warranting this Court's review exists.

---

[10] The Petitioners' reliance on *Water Power Co., Inc. v. PacifiCorp*, 99 Or. App. 125, 781 P.2d 860 (1989), *review denied*, 309 Or. 291, 787 P.2d 997, *cert. denied*, 498 U.S. 811 (1990) and *Bates Fabrics Inc. v. Public Utilities Commission*, 447 A.2d 1211 (Me. 1982) is equally misplaced. Under the Oregon regulatory scheme for PURPA discussed in *Water Power*, the Oregon Public Utility Commission approved rates for utility purchases from QFs established in yearly rate schedules. Thus, not only did the Oregon regulatory scheme not require a hearing with ratepayer participation to review rates, the Oregon Commission itself established the rates. In this action for breach of contract, the court simply held that a provision in a power purchase agreement that rendered the agreement void if a transmission agreement with a third party had not been executed as of a particular date was valid. In *Bates*, the parties agreed to a rate for the purchase of electricity and had entered a contract at that price *before PURPA had even been enacted*. Thus, the case is particularly inapposite here.

B. Because the PUC has not determined the rate for the project, Petitioners' argument relating to "excessive costs" of the project is unsupported

Petitioners also argue that the PUC and the courts have somehow allowed the QFs to avoid contractual obligations which will subject utility customers to excessive rates. Again, because the PUC has not yet begun to determine what the rate may be, Petitioners' argument that excessive costs will result rests on a fallacy. Because that ultimate determination has not yet been made, this Court should decline review of this case.

C. The PUC's authority to modify an agreement submitted to it for approval is a reasonable mechanism for enforcing the provisions of PURPA

Petitioners also object to the PUC's exercise of its authority to modify a PURPA contract submitted to it for approval and the courts' recognition of that authority. This argument rests on Petitioners' assertion that the agreement between Milesburg and West Penn was a purely private contract. The Petitioners fail to acknowledge that West Penn's submission of the contract to the PUC for approval and the regulatory review, which Armco and Allegheny sought, altered the private nature of the agreement.

In assessing this effect of the regulatory review process, the PUC and the Pennsylvania courts recognized that the PUC was authorized to analyze all of the terms of the contract and to modify those terms that did not comply with the Act it was required to implement. As this Court has recognized, the state regulatory agencies are best able to evaluate the circumstances that arise in implementing the Act in the individual states. The scheme developed in Pennsylvania, allowing modification, is a reasonable and permissible regulatory tool in the enforcement of the Act.

With PURPA, Congress established a regulatory scheme that allows the states to adopt different methods of imple-

menting the Act. Thus, Congress anticipated that administration of the Act would vary from state to state. Although the Petitioners note the different applications of PURPA among the states, they fail to acknowledge that variance was expressly within the contemplation of Congress. In addition, the cases cited by Petitioners involve fundamentally different fact patterns than that here.

Petitioners' assertion that this Court should address the fact that the Pennsylvania regulatory scheme differs from those of other states ignores this Court's approval in *FERC v. Mississippi* of the flexibility in administration that Congress evisioned. Pennsylvania's regulatory scheme properly implements PURPA. The Petitioners' objection to it is not a proper subject for this Court's review.

IV. ALTHOUGH THE PUC AND THE PENNSYLVANIA COURTS REASONABLY FOUND THAT THE QF INCURRED A "LEGALLY ENFORCEABLE OBLIGATION" AS OF THE TIME IT ENTERED A CONTRACT WITH THE UTILITY, THE PUC HAS NOT YET MADE A FINAL CALCULATION OF THE RATE UNDER THAT STANDARD AND THUS, THE QUESTION OF WHETHER THE RATE WILL RESULT IN EXCESSIVE COSTS IS NOT BEFORE THIS COURT

A. Petitioners' argument as to the appropriate date for calculation of "avoided costs" leads to an absurd conclusion

The PUC has not yet issued a final order as to the appropriate rate for the project as of the date it incurred a legally enforceable obligation to the utility. Perhaps in anticipation of a PUC conclusion that, as of the contract execution date, West Penn had anticipated a substantial capacity need, Armco and Allegheny, with West Penn, argue that another date, the date of the PUC's order directing modification of the Milesburg EEPA, should be used as the basis for the avoided costs analysis. Had the

PUC adopted the standard the Petitioners advocate, however, a utility's avoided costs could never be calculated.[11]

FERC recognized this potential dilemma in promulgating the federal PURPA regulations. In its comments issued with the PURPA regulations, FERC discussed how the regulations reconcile the requirement that rates for purchases from QFs equal the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments based, by necessity, on estimates of the utilities' future avoided costs. In response to comments that avoided costs at the time of delivery could be less than those at the time a legally enforceable obligation was incurred, FERC noted that a "minute-by-minute" evaluation of avoided costs was not required. It stressed:

> The import of this section [18 C.F.R. § 292.304 (b)(5)] is to ensure that a qualifying facility which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility; should the actual avoided cost be higher than those contracted for, the electric utility is nevertheless entitled to retain the benefit of its contracted for, or otherwise legally enforceable, lower price for purchases from the qualifying facility.

45 Fed.Reg. 12,214 at 12,224 (1980).

FERC further discussed the significance of requiring the avoided costs be calculated as of the date of a "legally

---

[11] Under the Petitioners' theory, when the PUC entered an order modifying an agreement, or even considered a QF's petition to compel a utility purchase, the rate would have to be analyzed as of the date of the final PUC order. At the outset of any proceeding, the parties would have to guess when the PUC would conduct and complete a hearing, consider exceptions or objections and then prepare a final order. If they guessed incorrectly, then the entire review process mandated by *Milesburg I* would have to be repeated. This scenario hardly meets the objective of PURPA to encourage independent power production.

enforceable obligation." It noted that by using the term "legally enforceable obligation" synonymously with "contract," it intended to prevent a utility from circumventing the avoided cost requirement merely by refusing to enter a contract with a qualifying facility. *Id.*

The Commonwealth Court recognized the significance of determining that the analysis of avoided costs be fixed as of the time a QF incurs a legally enforceable obligation to the utility. Because the court also recognized the ramifications of the regulatory review process, it also found that modifications necessitated by the review process did not alter the fact that the QF had obligated itself to the utility as of the time it entered the contract. The modifications imposed by the PUC did not alter the QF's commitment to deliver electric energy to the utility. The Commonwealth Court's determination comports with PURPA and recognizes the particular regulatory scheme developed in Pennsylvania.

B. Cases from other states cited by the Petitioners do not support their contention that the Pennsylvania decisions are contrary to PURPA

Again, Petitioners rely on cases from states with distinctly different regulatory schemes than that in Pennsylvania and thus with significantly different facts than those in this case to support their argument. Their reliance on these cases is misplaced.

Under Vermont's program for implementing PURPA, the Department of Public Service annually evaluates the avoided capacity and energy rates for the composite electric utility system in the state. It then files rate schedules that must be approved by the Public Service Board. Before a QF can begin construction it must also obtain a "certificate of public good" from the Board. In *Petition of East Georgia Cogeneration*, 158 Vt. 525, 614 A.2d 799 (1992), the court affirmed the Board's finding, that a QF was not entitled to a certificate of public good based

on the rates contained in a dated rate schedule. Because the QF could not establish a legally enforceable obligation prior to issuance of the certificate, this case is inapplicable to the facts here.

In Idaho, the Public Utility Commission also establishes rates for QF purchases with rate schedules and requires that negotiated power purchase agreements be submitted for approval. In *A.W. Brown v. Idaho Power Company*, 121 Idaho 812, 828 P.2d 841 (1992), a QF asked the Commission to direct a utility to enter a contract based on a dated rate schedule on the basis of a form letter addressed to "Dear Potential Electricity Supplier." 828 P.2d at 843. The court rejected the QF's contention that it needed only to achieve qualifying status to obligate a utility to purchase power at the rates that existed at the time it qualified.

Like the court in *Milesburg II*, the court in Idaho recognized that a legally enforceable obligation can arise at the time a QF enters a contract with a utility or at the time a QF files a complaint alleging that the project was mature and that the developer had attempted but failed to negotiate a contract with the utility. *Id.* at 843. The Idaho court found that the "Dear Potential Electricity Supplier" letter was not sufficient to establish a legally enforceable obligation because the QF had done nothing to obligate itself to the utility. Because Milesburg entered a contract with West Penn, this case is actually consistent with the Idaho court's decision in *A.W. Brown*.

Because it seeks to encourage the development of QFs at rates that do not exceed a utility's avoided costs, Pennsylvania's regulatory scheme is consistent with the goals of PURPA. The fact that the utility has joined with two of its industrial customers in their petition to this Court serves only to emphasize the disparity in the arguments throughout these long and arduous proceedings that these parties have used in contesting this project. In the absence of a federal issue, this Court should decline to re-

view Petitioners' contrived and factually unsupported arguments.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CLIFFORD B. LEVINE
(Counsel of Record)
ALICE B. MITINGER
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-2396
Counsel for
Mon Valley Energy Corporation